

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE DECARLO CHASE,

Defendant-Appellant.

UNPUBLISHED

October 21, 2014

No. 317102

Wayne Circuit Court

LC No. 13-002258-FC

Before: STEPHENS, P.J., and TALBOT and BECKERING, JJ.

PER CURIAM.

Defendant, Freddie Chase, appeals as of right his jury trial convictions for kidnapping, MCL 750.349, two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, unlawful imprisonment, MCL 750.349b, and two counts of assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced defendant to consecutive prison terms of 25 to 80 years for the CSC convictions, to be served concurrently to prison terms of 30 to 80 years for kidnapping, 5 to 15 years for unlawful imprisonment, and 1 to 4 years for each count of felonious assault. We affirm.

Defendant's convictions arise from assaults that occurred at his home. Defendant rented an upstairs room to Juante Stokes, one of the victims. The other victim was Stokes's former girlfriend, CC. On the day of the assaults, defendant was upset with Stokes, apparently over a missing telephone, and called Stokes down to the lower flat. When Stokes arrived, defendant and an accomplice confronted Stokes about the telephone, and then began beating him with a hammer and their fists. After Stokes had been gone for approximately five or ten minutes, CC went downstairs and observed defendant hitting Stokes with a hammer. Defendant noticed CC, began assaulting her with the hammer, and forced her to perform fellatio on him. Defendant and his accomplice then dragged CC to a back bedroom, where defendant forcibly engaged her in other acts of sexual penetration. Eventually, both victims were able to escape.

The only issue defendant raises on appeal concerns a missing audio recording of a 911 telephone call. The prosecution presented 911 audio recordings at trial, and one of the recordings referenced an earlier 911 telephone call in relation to this case. Outside the presence of the jury, the prosecutor acknowledged that she had attempted to locate that audio recording, but was unable to do so. Defense counsel requested all recordings of 911 calls, but the prosecution was not able to produce this particular recording because it had been deleted. The

prosecutor explained, “I did everything I could to get the call[,]” but the recording was unavailable. In lieu of providing defense counsel with the recording, the prosecutor provided a Computer Aided Dispatch (CAD) report associated with the call that had been given to her by law enforcement personnel. The CAD report confirmed the dispatch of emergency services at the request of a male caller; the prosecutor speculated that the caller was Stokes.

After bringing the jury back into the courtroom, Laura Manzella, the officer-in-charge of the case, testified about emergency calls to 911 that were received with regard to the charges against defendant and records regarding dispatches to defendant’s home that day. She acknowledged that one of the 911 calls, which was presumed to be from Stokes, was not produced, despite her requests for the recording. Manzella attempted to retrieve the missing 911 call; however, it had not been saved. Manzella obtained a CAD report for the call, which indicated that a male caller had made a request for “an Emergency Medical Services run.” When asked why she was unable to obtain the audio recording of the call, Manzella testified, “[b]ecause it was logged through for some reason for EMS CAD, which would have been a medical run instead of a police run, and I cannot get medical 911 runs. I’m a police officer. So I can’t get those.” She also explained that she did not initially realize that the call existed, because her initial search for 911 telephone calls did not include a search for medical calls or medical runs. Upon realizing that the call existed, Manzella requested the call, but was unable to secure it because, given the amount of time that had elapsed, the call had been deleted.

As noted, the circumstances surrounding the missing 911 recording were placed on the record before the jury. Defense counsel did not request that the jury be instructed that it could infer that the missing evidence was favorable to defendant. In addition, defense counsel affirmatively approved the jury instructions as given; therefore, defendant waived any claim that an adverse inference instruction should have been given. *People v Chapo*, 283 Mich 360, 372; 770 NW2d 68 (2009). However, we note that defendant claims that his trial counsel was ineffective for failing to request an adverse inference instruction. He maintains that, had the jury been instructed that it could infer that the missing evidence would have been favorable to defendant, it may have questioned the credibility of Stokes and had a reasonable doubt about defendant’s guilt. Defendant argues that this was a single, serious error by his trial counsel that resulted in a constitutionally deficient performance. Further, in passing, he argues that the prosecutor’s failure to produce the recording infringed upon his right of confrontation as well as his right to present a defense.

Because defendant did not raise an ineffective assistance of counsel claim in motion for a new trial or a *Ginther*¹ hearing, this Court’s review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To succeed on a claim of ineffective

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011).

The prosecution has a duty to preserve evidence that might be useful to a criminal defendant. *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989). "A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant." *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012). Similar to CJI2d 5.12, the missing witness instruction, this Court has explained that with regard to missing evidence, the trial court may instruct the jury that it may infer that the missing evidence would have been favorable to the defendant. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled on other grounds *People v Grissom*, 492 Mich 296; 821 NW2d 50 (2012). Such an instruction is only warranted where the defendant demonstrates that the prosecutor or police acted in bad faith in failing to produce the evidence. *Id.* at 515. The defendant bears the burden of demonstrating bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Here, an adverse inference instruction was not warranted because there was no evidence of bad faith on the part of the police or the prosecution. Manzella testified that the audio recording was not available because it was inadvertently deleted after she did not initially search for medical calls in addition to calls for police assistance. Further, defendant cannot carry his burden of demonstrating bad faith because the record reveals that, upon discovering the existence of the call, the prosecution and the police tried to locate the recording, but were unable to do so. Defendant has not produced any evidence suggesting that the prosecution or the police actively suppressed the telephone call or that they undertook any effort to prevent defendant from discovering the call. Rather, on this record, the evidence suggests that the call was inadvertently overlooked, and then destroyed as a matter of routine maintenance. The routine destruction of recorded police material, when the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). See also *United States v Garza*, 435 F3d 73, 76 (CA 1, 2006) ("[T]hat evidence was destroyed in the course of implementing routine procedures militates against a finding of bad faith.")

Therefore, on this record, an adverse inference instruction was not warranted. See *Davis*, 199 Mich App at 514-515. Because the instruction was not warranted, defense counsel could not be ineffective for failing to request it. Counsel is not required to make meritless motions. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Furthermore, defendant has not established that the missing audio recording was exculpatory or in any way beneficial to his case. Rather, his assertion that the recording could have given the jury reason to question Stokes's credibility is entirely speculative. And, in making this claim, defendant ignores that the CAD report, which contained a summary of the call, actually corroborated the victims'

testimony. Indeed, the CAD report indicated that there was a sexual assault in progress and that the victim was being held against her will.²

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Talbot

/s/ Jane M. Beckering

² In addition to arguing that he was denied the right to a properly instructed jury and the effective assistance of counsel, defendant argues, in passing, that the missing audio recording violated his right to confront witnesses and his right to present a defense. Because we find that there is no error in relation to the missing audio recording, we reject defendant's additional constitutional claims predicated on the missing audio recording.